

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSHUA SHUMAN, a minor by and through
his mother and natural guardian, TERESA
SHERTZER, and TERESA SHERTZER
Plaintiffs,

v.

PENN MANOR SCHOOL DISTRICT,
PENN MANOR SCHOOL BOARD,
GARY B. CAMPBELL, individually and as
Superintendent of the Penn Manor School
District,
AND
DONALD STEWART, individually and as
Acting Superintendent of the Penn Manor
School District,
AND
JANICE M. MINDISH, individually and as
Principal of Penn Manor High School of the
Penn Manor School District,
AND
BRIAN D. BADDICK, individually and as
Assistant Principal of Penn Manor High School
of the Penn Manor School District,
AND
PHILIP B. GALE, individually and as Dean of
Students of Penn Manor High School of the
Penn Manor School District,
AND
CAROLE FAY, individually and as a teacher
and Agriculture Coordinator at Penn Manor
High School of the Penn Manor School
District,
Defendants.

CIVIL ACTION
No. 02-CV-3594

(GARDNER)

PLAINTIFFS' OBJECTIONS TO ADMISSIBILITY OF DEFENDANTS' EVIDENCE

Plaintiffs, Joshua Shuman and Teresa Shertzter, by and through their undersigned counsel, file the within Objections to Admissibility of Defendants' Evidence and in support thereof, assert the following objections:

1. Plaintiffs object to the admissibility of Defendants' Exhibit D-11, Jeremy Fritsch Deposition Transcript. So long as Mr. Fritsch testifies, Plaintiffs concede that the exhibit may be used to impeach or contradict his testimony pursuant to Federal Rule of Civil Procedure 32(a)(1)

and Federal Rule of Evidence 801(d)(1). However, that would not mean that the entire deposition should be admitted. Only the particular part at issue could be used. It is only if a witness is determined to be unavailable under Rule 32 that the deposition transcript may be used “for any purpose.” Since it appears at this time that Mr. Fritsch will be testifying at trial, Plaintiffs object to the admissibility of his entire deposition transcript. If he does not so testify, his deposition could be used only if he is found by the Court to be either:

- a. dead; or
- b. at a greater distance than 100 miles from the trial, unless the absence was procured by the party offering the deposition; or
- c. unable to testify because of age, illness, infirmity or imprisonment; or
- d. unable to be subpoenaed; or
- e. that there are exceptional circumstances to allow the deposition to be used.

Fed.R.Civ.P. 32(a)(3). Furthermore, pursuant to Federal Rule of Evidence 804, former testimony is an exception to the hearsay rule only when it is determined that the declarant is unavailable. As such, since Defendants have not established that Jeremy Fritsch is unavailable, his deposition transcript should not be admitted into evidence.

2. Plaintiffs object to the admissibility of Defendants’ Exhibits D-8 and D-12, Joshua Shuman Deposition Transcript and Teresa Shertzer Deposition Transcript. Plaintiffs concede that the exhibits may be used to impeach or contradict their testimony pursuant to Federal Rule of Civil Procedure 32(a)(1) and Federal Rule of Evidence 801(d)(1). However, that would not mean that the entire deposition should be admitted. Only the particular part at issue could be used. Furthermore, pursuant to Federal Rule of Evidence 804, former testimony is an exception to the hearsay rule only when it is determined that the declarant is unavailable. As such, since Plaintiffs are not unavailable and will be testifying at trial, their deposition transcripts should not be admitted into evidence.

3. Plaintiffs object to the admissibility of Defendants’ Exhibit D-15, Report of Dr. Gerald Cooke. The report of Dr. Cooke is hearsay. He must testify to his opinions and their bases for the information to be admissible. Once he testifies, the report should still not be admitted into evidence as his testimony must be what is considered by the jury. It may end up

being inconsistent with the report and/or certain items in the report may be inadmissible due to the pending Motion in Limine Plaintiffs have filed.

4. Plaintiffs object to the admissibility of any opinion evidence by any of the Defendants themselves – Janice Mindish, Brian Baddick, Philip Gale, Carole Fay, and Donald Stewart. Pursuant to Federal Rule of Evidence 701, opinion testimony by a lay witness is limited to opinions or inferences which are:

- a. rationally based on the perception of the witness,
- b. helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
- c. not based on scientific, technical or other specialized knowledge within the scope of Rule 702 (dealing with Testimony by Experts).

Plaintiffs anticipate that Defendants may attempt to testify about issues of liability based on each of their specialized knowledge in the field of education – principal, assistant principal, teacher, and superintendent. If Defendants attempt to do so, it would be improper opinion testimony by lay witnesses, and in violation of Rule 701.

Respectfully submitted,

BY: /s/ Deirdre A. Agnew
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DATE: February 23, 2004

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CERTIFICATE OF SERVICE

I, Deirdre A. Agnew, Esquire, hereby certify that on the 23rd day of February, 2004, a true and correct copy of Plaintiffs' Second Amendment to Trial Memorandum, was served on Defendants or their counsel via first class, regular mail, postage prepaid, at the following address:

Ellis H. Katz, Esquire
Jason R. Wiley, Esquire
Sweet, Stevens, Tucker & Katz, LLP
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P.O. Box 5069
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BY: /s/ Deirdre A. Agnew
DEIRDRE A. AGNEW, ESQUIRE